Filed 11/18/03 P. v. Reyes CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS REYES,

Defendant and Appellant.

F040037

(Super. Ct. No. SC083248A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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An information filed November 9, 2001, charged Louis Reyes (appellant) and two codefendants, Mario Carlos Lopez (Lopez) and Marc Raymond Zuniga (Zuniga), with

attempted murder in violation of Penal Code sections 664/187, subdivision (a).[1] It was further alleged that, in the commission of the attempted murder, appellant inflicted great bodily injury within the meaning of section 12022.7. Appellant was also charged with assault by an inmate with a deadly weapon or by force likely to produce injury pursuant to section 4501. It was further alleged in both counts that appellant had suffered four prior strikes within the meaning of section 667, subdivisions (c) through (j), and section 1170.12, subdivisions (a) through (e), and suffered a prior prison term within the meaning of section 667.5, subdivision (b). Appellant pled not guilty and denied all enhancing allegations.

Appellant and Lopez were tried by jury beginning February 19, 2002. On February 22, 2002, appellant was found not guilty of the attempted murder charge and guilty of the assault charge. In a bifurcated court trial, all of the enhancement allegations were found true.

Appellant asked for immediate sentencing and was given a term of 25 years to life in state prison. The enhancement pursuant to section 667.5, subdivision (b), was stayed. Presentence credit was not awarded but was to be determined by the probation department.

FACTUAL HISTORY

Correctional Officer Jose Galvan was employed at the California Correctional Institution (CCI) in Tehachapi. Part of his duty was to observe the inmates while they exercised in the yard. Galvan was positioned in an observation tower about 10 feet above the entrance/exit to the yard. On October 7, 2001, at approximately 12:20 p.m., the west wall of the yard was in shadow.

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[1]All further statutory references will be to the Penal Code unless otherwise stated.

Galvan testified there were 10 or 11 inmates in the particular group he was watching. He knew most of them by sight. Galvan recognized inmates Medina, appellant, Lopez, and Zuniga.

Inmate Medina was standing against the west wall of the yard. Appellant walked up and struck Medina in the face. Medina bounced off the wall and fell to the ground. Appellant continued to punch and kick Medina as he lay on the ground. Lopez and Zuniga joined in the attack.

From the tower, Galvan ordered the inmates to get down. The uninvolved inmates complied, but appellant, Lopez, and Zuniga did not and continued to assault Medina. Eventually, Galvan fired a rubber bullet, striking Zuniga in the buttock, and Zuniga laid down. Appellant and Lopez continued the assault, but appellant eventually retreated and laid down. After a rubber bullet struck Lopez in the wrist, he also retreated and laid down. The inmates were then removed from the yard one at a time.

These events were captured on tape by surveillance cameras at opposite ends of the yard. The surveillance tapes were admitted into evidence and portions were played at trial.

Once the inmates cleared the yard, Galvan found a sharpened object near the west wall. The object had been broken into two pieces. While he observed the incident, Galvan did not see any inmate with a weapon. The inmates had been searched prior to going into the yard and no weapons had been found.

At trial, Galvan was unable to identify anyone appearing on a freeze frame of the tape as all six figures had their backs to the camera and were dressed the same.

Medina was transported to the hospital where he was treated for wounds on his face and neck. He required a total of 12 to 15 stitches on five or six different wounds.

Defense

Correctional Officer Robert Lenker testified that he helped process the inmates out of the yard after the incident. Lenker made personal contact with each inmate and

recorded the order in which each inmate was processed. Appellant's defense at trial was that when the inmates appearing in the surveillance tape were matched with the order of their departure from the yard in Lenker's report, the initial perpetrator of the assault on Medina was an inmate named Brigante, not appellant.

On cross-examination, Lenker stated he reviewed the video tape of the incident and identified appellant as the first person to strike Medina. Evidence in medical reports was admitted indicating that Zuniga and Lopez had injuries to their hands following the attack on Medina, but appellant showed no such injuries.

DISCUSSION

I. Sufficiency of the evidence

Appellant contends the evidence is insufficient to support a finding that he was involved in the attack on Medina because neither the testimony of Officer Galvan nor the surveillance tapes admitted at trial were sufficient to identify him as the perpetrator.

We review claims of insufficient evidence by evaluating the record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value, from which a reasonable trier of fact could have found the essential elements beyond a reasonable doubt. (*People v. Price* (1991) 1 Cal.4th 324, 462.) All reasonable inferences must be drawn in support of the true finding or judgment. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576.) An appellate court may not reverse a conviction on the ground of insufficient evidence unless it clearly appears "that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

> "'It is well settled in California that one witness, if believed by the jury, is sufficient to sustain a verdict. To warrant the rejection by a reviewing court of statements given by a witness who has been believed by the trial court or the jury, there must exist either a physical impossibility that they are true, or … it must be inherently improbable and such inherent improbability must plainly appear.' [Citations.] It also is true that uncertainties or discrepancies in witnesses' testimony raise only evidentiary issues that are

for the jury to resolve. [Citation.]" (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1259.)

Here, the evidence is sufficient to find that appellant assaulted Medina. Officer Galvan, who witnessed the event, positively identified appellant as the initiator of the assault. He also identified appellant as one of the inmates who continued to assault Medina after all inmates were ordered to get down. Galvan testified that he was familiar with the inmates as he had watched them in the yard for several months. In addition, Lenker, in viewing the surveillance tape, identified appellant as the inmate who first struck Medina.

"[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.]" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) There is sufficient evidence to find appellant participated in the attack on Medina.

II. True findings of the prior convictions

At a bifurcated proceeding, the court found the prior conviction allegations to be true. The court based its findings on information that was admitted as Exhibit 16, consisting of documents certified by the Department of Corrections. Defense counsel argued that the documents in Exhibit 16 did not include anything to prove they belonged to appellant and the picture included in the information was unreliable. The prosecutor argued that the picture toward the end of Exhibit 16 was an accurate representation of appellant, but that was a determination to be made by the trial court.

On appeal, appellant contends the findings of the court must be vacated because the evidence used was apparently lost or destroyed by the state and "cannot be reconstructed so as to preserve all potential issues by which appellant might challenge the judgment below …." Appellant made a motion to augment the record with Exhibit 16 after filing his opening brief, but the augmentation provided by the superior court was

incomplete because no photograph was provided. Fortunately, the record was later augmented at respondent's request to include a complete copy of Exhibit 16 that was relied on by the court. Appellant, in his reply brief, acknowledges that the absence of the photograph formed the basis for his argument. We therefore do not address appellant's argument further.

III. Cruel and unusual punishment

At sentencing, appellant's counsel argued that imposition of punishment under the "Three Strikes" law was cruel and unusual under the Eighth Amendment to the United States Constitution. Appellant repeats that argument here, claiming the sentence also violates the California Constitution on its face and as applied to him.

Appellant first attacks the constitutionality of the Three Strikes law on its face by arguing that the statute "does not recognize significant gradations of culpability depending on the severity of the current offense and does not take into consideration mitigating factors." He concludes that the three-strikes sentencing scheme is therefore arbitrary and capricious. The substance of appellant's claim has been consistently rejected. (See, e.g., *People v. Edwards* (2002) 97 Cal.App.4th 161, 164-166; *People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824, 828-829; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1328, 1332.) We agree with the reasoning and conclusions expressed in these cases and do not repeat them here.

Appellant's reliance on *Woodson v. North Carolina* (1976) 428 U.S. 280 and *Eddings v. Oklahoma* (1982) 455 U.S. 104 is misplaced. Both *Woodson* and *Eddings* hold that the consideration of the character and record of the individual offender and the circumstances of the particular offense are an indispensable part of considering infliction of the death penalty—not a penalty of 25 years to life. (*Woodson v. North Carolina, supra,* 428 U.S. at pp. 303-304; *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 111-112.)

Appellant next contends that the Three Strikes law is cruel and unusual as applied to him. In assessing appellant's claim under the state Constitution, we note that it is the

Legislature's function to define crime and prescribe punishment. The judiciary may not interfere in this process unless the statute prescribes a penalty so severe in relation to the crime that it violates the constitutional prohibition against cruel or unusual punishment. (*People v. Dillon* (1983) 34 Cal.3d 441, 478; *In re Lynch* (1972) 8 Cal.3d 410, 423-424.) The basic test is whether the punishment is "'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon, supra,* 34 Cal.3d at p. 478; *In re Lynch, supra,* 8 Cal.3d at p. 424, fn. omitted.) In determining whether a particular punishment is cruel and/or unusual, courts examine the nature of the particular offense and offender, the penalty imposed in the same jurisdiction for other offenses, and the punishment imposed in other jurisdictions for the same offense. (*In re Lynch, supra,* 8 Cal.3d at pp. 425-427; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 199.) Appellant must overcome a considerable burden to show that his sentence was disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

Appellant has failed to meet this burden. Regarding the first prong of the *Lynch* analysis, the nature of the offense and the offender, appellant states only that his record shows he is a recidivist, and there is no connection between the current offense and his prior convictions. Appellant attempts to minimize his past criminal history. There is no current probation report in this case because appellant asked for immediate sentencing and waived the right to have a probation report produced for the court to consider. However, his past history shows he was convicted of a violation of section 211, second degree robbery, in December 1998; he was convicted of a violation of section 459, first degree burglary, and two violations of section 245, subdivision (a)(2), assault with a deadly weapon, in April 1992. In addition, appellant committed the current offense while he was serving a prison term for an unrelated offense.

The second prong of the *Lynch* analysis demands an examination of the proportionality of the sentence received by California defendants for similar convictions. Appellant relies on *People v. Wingo, supra,* in which an indeterminate sentence of six months to life for a violation of section 245, subdivision (a), was found to be suspect under *Lynch.* Appellant, however, misses the point. We have already stated in *People v. Cooper, supra,* that "proportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible." (*People v. Cooper, supra,* 43 Cal.App.4th at p. 826.) Appellant is subject to the lengthy sentence not just because he committed his current offense, but also because of his recidivist behavior. He has received exactly the same punishment as any other felon with two or more strikes.

Regarding the third prong of *Lynch*, appellant argues that the punishment imposed is disproportionate when compared with the penalties that would be imposed in other states on a defendant similarly situated to appellant. Appellant has provided us with a thorough review of the sentencing schemes in other states and contends the penalty imposed in this case is out of line with the sentence appellant would receive in other jurisdictions.

Other jurisdictions may impose shorter terms for recidivists whose current offenses and criminal history are comparable to those of appellant. However, this does not compel the conclusion that appellant's sentence is disproportionate to his criminal status.

> "The assumption underlying the other-jurisdiction comparison is that the majority of those jurisdictions will have prescribed punishments for this offense that are within the constitutional limit of severity; and if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness. (*In re Lynch, supra,* 8 Cal.3d at p. 427.) However, as the … court [in *Harmelin v. Michigan* (1991) 501 U.S. 957] noted, the needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any

> other state. Nothing in the prohibition against cruel or unusual punishment per se disables a state from responding to changed social conditions and increasing the severity with which it treats its recidivist felons." (*People v. Cooper, supra,* 43 Cal.App.4th at p. 827.)

Considering the dangers that repeat offenders pose to society, the imposition of a 25-years-to-life sentence for third strikers such as appellant does not shock the conscience or offend fundamental notions of human dignity. We conclude appellant's sentence is not disproportionate and does not constitute cruel or unusual punishment under the California Constitution. (*People v. Cooper, supra,* 43 Cal.App.4th at p. 828.)

As for appellant's claim under the federal Constitution, the Eighth Amendment prohibits only extreme sentences that are grossly disproportionate to the crime committed; there is no requirement of strict proportionality between crimes and sentence. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1001.) In fact, in a noncapital case, a violation based on disproportionality is rarely found and the circumstances must be extreme. (See *Lockyer v. Andrade* (2003) 538 U.S. 63 [123 S.Ct. 1166].) In *Harmelin*, *supra,* the court rejected a disproportionality argument raised by the defendant who, with no prior record, received a sentence of life without possibility of parole for possession of 672 grams of cocaine. (*Harmelin v. Michigan, supra*, 501 U.S. at pp. 961-962, 996 (plur. opn. of Scalia, J.).)

If *Hamerlin's* sentence was not disproportional under the federal Constitution, given his lack of a prior record and that his offense involved no violence, then appellant cannot contend his sentence was cruel or unusual. In fact, after the United States Supreme Court decision in *Lockyer, supra,* there is some question whether the principle of gross disproportionality should apply at all to a sentence imposed under a recidivist statute, such as the Three Strikes law. (See *Lockyer v. Andrade, supra,* 538 U.S. [123 S.Ct. at p. 1175].)

Appellant's crime involved a violent act. He also had a significant criminal record and was in prison at the time of the current offense. Thus, we conclude his sentence is not grossly disproportionate to his crime and does not violate the Eighth Amendment.

IV. Presentence credit calculations

Appellant contends his case should be remanded for presentence credit calculations because he was erroneously awarded zero presentence credit days even though both parties acknowledged he was entitled to some credits.

As previously mentioned, appellant was sentenced, at his own request, immediately after he was convicted. At sentencing, the court stated:

> "Credit for time served will be determined by the probation officer … which they will be submitting with the defendant to go to Department of Corrections. If there is any question on that, you will have to come back to the Court."

This fact was reiterated by the deputy district attorney, who stated:

> "Just for the record, the inmate Reyes would be getting credit for time served from the date he paroled and the hold was placed on him and he was transported to the jail, which I believe is where he currently resides. He would be getting credit for time served just as if he committed a crime on the outside and had been waiting in jail for his trial, but I have no way of knowing what that date is at the moment."

Section 2900.5 provides that the superior court imposing sentence has a duty to calculate the number of credit days and to include the same in the abstract of judgment. (§ 2900.5, subd. (d); *People v. Goodloe* (1995) 37 Cal.App.4th 485, 495-496.) We will remand this matter to the trial court for purposes of determining appellant's presentence credits, if any, and to amend the abstract of judgment accordingly.

DISPOSITION

Judgment is affirmed. The trial court shall determine appellant's presentence credits, if any, and amend the abstract of judgment with copies sent to the appropriate authorities.

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Wiseman, J.

WE CONCUR:

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Buckley, Acting P.J.

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Levy, J.